TABLE OF CONTENTS

	Page
Motion for Leave To File Brief Amici Curiae	1
Brief Amici Curiae	5
Interest of the Amici Curiae	5
Introductory Statement	8
Summary of Argument	9
Argument	11
I. The Rhode Island and Pennsylvania purchase of secular education services statutes erode parents' fundamental right to educate their children in the school of their choice as guaranteed by *Pierce* v. *Society of Sisters,* and constitute an arbitrary and unreasonable conditioning of aid to secular nonpublic schools.	11
II. The Rhode Island and Pennsylvania statutes fail to provide aid in the neutral manner required by the First and Fourteenth Amendments because different amounts are provided for a student depending on which school he attends.	19
III. The Rhode Island and Pennsylvania purchase of secular education services statutes violate the equal protection clause of the Fourteenth Amendment because the states failed to ensure that students' opportunity to enroll in aided schools is not conditioned on race or color; plaintiffs in *Lemon* have standing to raise the issue.	22
IV. The Rhode Island and Pennsylvania statutes violate the Establishment Clause of the First Amendment because distinctions between primarily secular and primarily religious instruction in religious schools cannot reliably be made; moreover, in the attempt to provide a dependable method for making such distinctions these laws	

Page
create an impermissible degree and kind of entanglement between government and religion in violation of *Walz* v. *Tax Commission*. 28
Conclusion 37

Table of Citations

Cases

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 31
Board of Education v. *Allen*, 392 U.S. 236 (1968) ... 10, 19, 20, 28, 29, 31, 36, 37
Braunfeld v. *Brown*, 366 U.S. 599 (1961) 21
Brown v. *Board of Education*, 347 U.S. 483 (1954) 22
Brown v. *South Carolina State Board of Education*, 296 F. Supp. 199 (D.S.Car. 1968), *aff'd per curiam*, 393 U.S. 222 18
Cochran v. *Louisiana State Board of Education*, 281 U.S. 370 (1930) 20
Cooper v. *Aaron*, 358 U.S. 1 (1958) 23
Coffey v. *State Education Finance Commission*, 296 F.Supp. 1389 (S.D.Miss. 1969) 27
Dean Milk Co. v. *Madison*, 340 U.S. 349 (1951) 15
Everson v. *Board of Education*, 330 U.S. 1 (1946) .. 19, 20, 29, 36
Farrington v. *Tokushige*, 273 U.S. 284 (1926) 13, 17, 18
Flast v. *Cohen*, 392 U.S. 83 (1958) 27
Frost Trucking Co. v. *Railroad Commission*, 271 U.S. 583 (1926) 14
Green v. *County School Board*, 391 U.S. 431 (1968) ... 26
Griffin v. *State Board of Education*, 296 F. Supp. 1178 (E.D.Va. 1969) 25

Page

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 13
Johnson v. *Sanders*, 39 U.S.L.W. 2225 (D.Conn., Oct. 14, 1970) 24, 32, 36
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 13, 16, 17, 18
Pennsylvania v. *Brown*, 270 F. Supp. 782 (E.D.Pa. 1967), *aff'd* 392 F.2d 120 (3rd Cir. 1968), *cert. denied*, 391 U.S. 921 23
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) .. 9, 11, 13, 14, 16, 18
Poindexter v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968) 18, 25
Shelton v. *Tucker*, 364 U.S. 479 (1960) 14, 15, 21, 26
Sherbert v. *Verner*, 374 U.S. 398 (1963) 10, 14, 21
Speiser v. *Randall*, 357 U.S. 513 (1958) 14, 21
Turner v. *Fouche*, 38 U.S.L.W. 4090 (1970) 24
United States v. *Board of Education of City of Bessemer*, 396 F.2d 4446 (5th Cir. 1968), *cert. denied*, 393 U.S. 1060 24
United States v. *School District 151 of Cook County, Illinois*, 301 F. Supp. 201 (N.D.Ill. 1969), *aff'd*, F.2d (7th Cir. 1970) 24
Walz v. *Tax Commission of the City of New York*, 90 S.Ct. 1409 (1970) 10, 20, 21, 28, 32, 33, 34, 36, 37
Welsh v. *United States*, 90 S.Ct. 1792 (1970) 17, 30
Wieman v. *Updegraff*, 344 U.S. 183 (1952) 35

Constitutional and Statutory Provisions

Constitution of the United States:
First Amendment 10, 13, 14, 15, 17, 18, 19, 20, 28, 31, 37
Fourteenth Amendment 10, 19, 22, 26, 27, 31

Pennsylvania Page

PA. STAT. ANN. tit. 24, §§ 5601-5609 (1968) 12, 13, 23, 29

R.I. GEN. LAWS §§ 16-51-2 - 51-9 (1969) 12, 13, 14, 24, 28, 29, 34, 35

Miscellaneous

Areen, *Public Aid to Nonpublic Schools: A Breach in the Sacred Wall?*, 22 CASE W. RES. L. REV. No. 2 (1971) 22

Arons, *The Joker in Private School Aid*, SATURDAY REVIEW, Jan. 16, 1971 7

J. COONS, W. CLUNE, & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970) 28

G. DENNISON, THE LIVES OF CHILDREN (1969) 7

Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065 (1968) 26

Education Vouchers: A Report in Financing Education by Grants to Parents, prepared for the United States Office of Economic Opportunity by the Center for the Study of Public Policy (1970) 18, 26

Lawrence, *Free Schools: Public and Private and Black and White*, INEQUALITY IN EDUCATION nos. 3 and 4 (1970) 7

Michaelman, *On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) 28

Note, *Sectarian Books, the Supreme Court and the Establishment Clause*, 79 YALE L. J. 111 (1969) 30

Pennsylvania Office of Aid to Nonpublic Schools, An Analysis of Significant Data (1970) 19

Stretch, *The Rise of the Free School*, SATURDAY REVIEW, June 20, 1970 7

UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967) 23, 24

Page

United States Department of Commerce, Bureau of the Census, 1960 Census of Population 23

Current Population Reports, Series P-60 #75 (Dec. 1970) 27

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 569, 570

WILLIAM P. ROBINSON, Jr., et al., *Appellants* and
JOHN R. EARLEY, et al., *Intervenor-appellants*
v.
JOAN DICENSO, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

No. 89

ALTON J. LEMON, et al., *Appellants*
v.
DAVID H. KURTZMAN, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN Nos. 569, 570 AND TO FILE BRIEF AMICI CURIAE, OUT OF TIME, IN No. 89.

The following organizations—Center for Law and Education, Harvard University; East Harlem Block Schools; Milwaukee Federation of Independent Community Schools; Federation of Boston Community Schools; Bay High School; The Learning Place; Minuscule; New Community School; Primary Life School; and Symbas School—hereby move pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief amici curiae, in the above titled cases. In No. 89 appellants and the State of Pennsylvania and Pennsylvania Association of Independent Schools

as appellees have given consent to filing; but other named defendants below have either withheld consent or failed to respondent to our requests. In Nos. 569, 570 appellees have consented,[1] but appellants Earley and Robinson have withheld consent. The attached brief amici curiae is in support of the position of appellants in No. 89 and of appellees in No. 569, 570.

Under the briefing schedule established by this Court briefs amici curiae supporting the position of appellants in No. 89 were due in August, 1970. Since that time the Court has agreed to hear Nos. 569, 570[2] which raise substantially the same issues as No. 89. Briefs amici curiae in support of the position of appellees in Nos. 569, 570 are due by February 1, 1971. Movant organizations respectfully request that leave be granted to file the attached brief in Nos. 569, 570 and to file the attached brief out of time in No. 89.

As set out below and in Interest of the Amici, movant organizations represent a large number of non-public community schools whose basic interests and continued existence are directly affected by these cases. Movant organization Center for Law and Education has had extensive experience in working on equal education opportunity problems of minority groups and the poor, and was funded by the United States Office of Economic Opportunity to represent and articulate the interests of such groups. Movant organizations desire to present to the Court a unified treatment of the problems common to Nos. 89, 569, 570.

The scope of the problems involved in No. 89 and their ramifications for amici schools and the equal education opportunity of the poor and racial minorities were not clear until the Court noted probable jurisdiction in Nos. 569,

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[1] Written consent of these parties has been filed with the Clerk.

[2] Probable jurisdiction was noted on November 10, 1970. 39 U.S.L.W. 3194.

570 and cases involving similar laws were brought in lower federal courts in other states.[3] Movant organizations believe that the scope of the questions presented in all these cases can best be presented by treating the contested laws together in one brief.

The Center for Law and Education, Harvard University, was created jointly by Harvard Law School and Harvard Graduate School of Education, and is funded by the United States Office of Economic Opportunity to work in conjunction with local Legal Services Offices to "promote reform in American education by working in the area of social policy and the law." The Center is in contact with over 250 legal service offices involved with problems of the poor and has actively assisted scores of them in education litigation. The Center also does research into these problems and provides technical assistance to community groups and others concerned with equal education opportunity.

Amici schools are individual or federated, non-sectarian, non-public schools providing racially integrated experimental education. They are largely governed by parents, and are committed to community based education in urban areas across the country. The financial plight of amici schools is the same as parochial schools', but the composition of student body, method of governance, and nature of the curricula, all of which will be affected by these cases, are different. The unorthodox nature of this curriculum and the low income and racial composition of their student bodies make their interests substantially different from those of other kinds of non-public schools. All of these schools and the Center for Law and Education share a commitment, expressed in work, to equal education opportunity for those in public and non-public schools.

The interests of experimental, non-public schools such as those of amici, and the equal education opportunity interests

[3] E.g., *Johnson* v. *Sanders*, 39 U.S.L.W. 2225 (D.Conn. Oct. 14, 1970).

of the poor in public and non-public schools are not adequately represented by the parties or other amici in these cases. Movant organizations wish to bring to the Court's attention educational, racial, and economic consequences of these cases. These consequences are of constitutional magnitude not adequately dealt with by the parties. Movant organizations are well-equipped by virtue of their direct interests, experience with schooling, and extensive research and representation of interests of the poor and racial minorities to inform the Court of the national consequences of these cases for equal education opportunity.

Accordingly, movant organizations respectfully request that the Court grant leave to file the attached brief amici curiae.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 569, 570

WILLIAM P. ROBINSON, Jr., et al., *Appellants* and
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICI CURIAE

For the Center for Law and Education, Harvard University; East Harlem Block Schools; Milwaukee Federation of Independent Community Schools; Federation of Boston Community Schools; Bay High School; The Learning Place; Minuscule; New Community School; Primary Life School; and Symbas School.

Interest of the Amici

Amici schools are East Harlem Block Schools, Milwaukee Federation of Independent Community Schools, Federation of Boston Community Schools, Bay High School, The Learning Place, Minuscule, New Community School, Primary Life School, and Symbas School.[1] Amici schools

[1] Amici schools are typical of a large number of "alternative" or

are independent and federated non-public community schools which represent a growing national education resource for racially integrated, experimental education. Schools of amici operate on the basis of deeply held philosophical, moral and educational beliefs, but are not affiliated with religious organizations. Schools of amici are set primarily in urban areas throughout the country, and include among their basic goals the creation of multicultural education for children of Black Americans and families with little or no income. Amici schools are pedagogically experimental and offer unorthodox curricula firmly based in concern for community development, cultural pride, and the individual development of students who have previously not benefitted from the tradition-bound offerings of public schools. The governance of amici schools is decentralized and rests in the hands of teachers, parents and students.

"community" schools which do not belong to any national association. The following brief descriptions are examples: *Milwaukee Federation* is comprised of seven schools formerly operated by the Catholic Church but turned over to the local community in 1969 and relying heavily on parent involvement and control. These decentralized schools provide free integrated education, with one school specializing in bilingual programs and one in programs for handicapped children. *Boston Federation* comprises three large schools attended by a majority of black students and supported partly through local fund raising and partly through foundation grants. No tuition is charged since a great percentage of the families involved have low incomes. Curricular emphasis is upon basic skills and the history and culture of Black Americans. *Bay High School* in Berkeley, California includes children 13-17 years old, is racially and economically mixed, and devotes part of its open structure curriculum to apprenticeships and involvement in real life problems of the community. *The Learning Place* is located in San Francisco and attended by 12-15 year olds in an ungraded program based on small groups and individual instruction. Students make all the basic decisions about their education. Students and staff have created an atmosphere of emotional openness which fosters learning and personal growth. Tuition is graduated according to ability to pay. *New Community School* of Oakland, California is an integrated high school with a black studies department and a heavy orientation toward multi-cultural education, community development, and experiments in governing structure involving parents, students and members of the community.

Amici schools are examples of hundreds of such individual new schools staffed by teachers and parents dedicated to making education creative and useful to minority groups.[2] Amici schools differ considerably in composition of student body, curriculum, and governance from most of the parochial schools and traditional "prep" schools which form the conventional public image of non-public schools. Amici schools share, however, the financial plight of these other non-public schools.

The future of amici schools, and the resource for relevant education and equal education opportunity they represent, requires that aid to non-public schools be delivered in a form which does not do violence to their educational philosophy and constitutional rights. Our research and experience indicate that the statutes at issue in these cases will eliminate amici schools and seriously hamper the educational progress of minority groups.

Amicus Center for Law and Education, Harvard University, was established in 1969 by Harvard University Law School and Graduate School of Education and by the United States Office of Economic Opportunity to "promote reform in American Education by working in the area of social policy and law." To carry out these purposes the Center has engaged in a wide area of research, technical assistance, and litigation on behalf of the educational rights of the poor and minority groups. The Center's major interest, which is expressed in its relations with Legal Service Offices across the country, is to

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[2] More detailed descriptions of the myriad and varied community schools can be found in G. DENNISON, THE LIVES OF CHILDREN (1969); Lawrence, *Free Schools: Public and Private and Black and White*, INEQUALITY IN EDUCATION numbers 3 and 4 (1970); Stretch, *The Rise of the Free School*, SATURDAY REVIEW, June 20, 1970. *See also* Arons, *The Joker in Private School Aid*, SATURDAY REVIEW, January 16, 1971, for additional comments on the educational effects on these schools of purchase of secular services legislation.

secure equal education opportunity to all citizens through legal and educational evaluations of public and private education. The Center's experience puts it in a unique position to evaluate the consequences of the instant cases for groups of citizens whose interests in education usually go unrepresented. The Center has served as amicus curiae in several of its areas of interest.

Amici submit this brief because they believe that their unique interests are affected but not represented by the parties or other amici curiae in these cases; because the Court's decisions in the cases before it will have significant influence on the quality of education and the form of aid to non-public schools adopted in states throughout the Union where amici schools or schools like them are located; because certain questions of public policy of constitutional magnitude are raised by and relevant to the disposition of these cases, but have not been adequately presented by the parties; and because amici believe that while the laws at issue in these cases will have unfortunate effects educationally, racially and economically, and are unconstitutional, forms of general aid to non-public schools which protect the constitutional rights of both amici and religiously affiliated schools and advance the national goal of equal education opportunity should not be precluded by the Court's decisions in these cases.

Introductory Statement

The record in *Robinson* v. *DiCenso,* the pertinent Pennsylvania and Rhode Island constitutional and statutory provisions, the provisions of the United States Constitution involved, and the opinions of the courts below are set out in the briefs filed by the appellants and appellees. These amici accept them for purposes of their brief.

Summary of Argument

There is a growing financial crisis in the non-public schools of this country. It will continue unless public funds are made available to aid them for the education they provide to millions of students. Amici favor extensive aid to non-public schools—including those operated by religious institutions—but object strongly on constitutional grounds to the *form* of aid embodied in the statutes contested in these cases. Amici believe, however, that constitutionally acceptable forms of providing aid to all non-public schools do exist and are practical alternatives.

I. *Pierce* v. *Society of Sisters,* 268 U.S. 510, guarantees to parents the right to direct the education of their children by choosing schools not run by the state. In an attempt to satisfy Establishment Clause restrictions, the Pennsylvania and Rhode Island statutes have created a pervasive set of regulations for aided non-public schools based on conformity to the offerings and approaches of public schools. The effect of these regulations is to condition the granting of aid upon the forfeiture by unorthodox non-public schools of their educational principles and beliefs, and to erode the rights guaranteed by *Pierce.* These regulations are unconstitutional in view of the fact that there are practical, less restrictive approaches available to a state which wishes to provide general aid to non-public schools.

The requirements of using state approved teaching materials, teaching only what is taught in the public schools, and having only state certified teachers in aided courses are arbitrary and unreasonable when applied to secular non-public schools where there is no need to separate religious from secular teaching. Again, the availabilty of practical, less restrictive alternatives, makes the requirements unconstitutional.

II. The First Amendment, which applies to the states through the Fourteenth Amendment, requires that the states steer a course of neutrality in their relationships with religions, neither favoring one sect over others, nor religion over non-religion. Both the statutes at issue fail to meet this test because the amounts of aid per pupil available under them varies depending upon the non-public school chosen by the parents. This inequity is a function of aiding teachers or courses instead of pupils. This attachment of differential economic consequences to religious choices is directly contrary to *Sherbert* v. *Verner*, 374 U.S. 398 and puts the state in the position of favoring the schools of some sects over others. The aid provided in Pennsylvania, for example, ranged from $25 to $250 per pupil last year depending upon the school attended. The state has no legitimate justification for these extreme disparities, especially in view of the less restrictive alternatives available.

III. At present, non-public schools are attended almost exclusively by white students, and in a number of cases now pending many non-public schools have been alleged to be discriminatory in their admissions policies. In view of this situation, the Rhode Island and Pennsylvania statutes fail to provide adequate assurance that every student's opportunity to attend aided non-public schools is not conditioned on race or color. Effective mechanisms for preventing discrimination could have been adopted. The Plaintiffs in *Lemon* are entitled to standing to raise these issues since it is the absence of a plan of safeguards to which they object.

IV. The Pennsylvania and Rhode Island statutes violate the religion clauses of the First Amendment as articulated in *Board of Education* v. *Allen*, 392 U.S. 236, and *Walz* v. *Tax Commission*, 90 S.Ct. 1409. The attempt of these statutes to limit state aid to strictly secular activi-

ties fails because the distinctions which were useful in judging textbooks in *Allen* are not reliable for regulating teaching. Separating religious and secular activities is particularly difficult when dealing with courses inside religious schools where the composition of the student body and the beliefs of those who control such schools would lead one to expect the permeation of allegedly secular teaching with religious overtones and content. The burden is properly on the states to show that the means chosen to separate the religious and the secular in religious schools are in fact reliable. This they have failed to do.

Nonetheless, in attempting to regulate course content and teaching, the statutes at issue have established a complex of regulations and ongoing surveillance which entangles the states with religion to such a degree that they are in violation of the standard enunciated in *Walz*. Normal state regulations of non-public schools do not create such entanglement because such regulations are not aimed at distinguishing the religious from the secular.

In view of the realistic alternatives open to the states for providing aid to non-public schools without violating all of the constitutional principles noted in this brief, these statutes are unconstitutional, and should be struck down in a way which leaves room for more equitable and neutral legislation.

Argument

I. The Rhode Island and Pennsylvania Purchase of Secular Education Services Statutes Erode Parents' Fundamental Right to Educate Their Children in the School of Their Choice as Guaranteed by *Pierce* v. *Society of Sisters*, and Constitute an Arbitrary and Unreasonable Conditioning of Aid to Secular Non-public Schools.

The Rhode Island and Pennsylvania laws in question[3] impose substantial educational uniformity as a condition of aid; are anti-competitive to a degree which threatens the legitimate autonomy of all private schools; and are based upon the false assumption that the courses and books of the public schools are the only ones which can adequately express the legislature's concern with quality secular education for all youth.

Specifically, the statutes limit aid to those courses which use the same materials as public schools, or materials approved by the Superintendent of Public Instruction, thereby overly restricting the educational method and content of courses.[4] The statutes also limit aid to courses which are taught by teachers with state certificates, despite the fact that there is no general state requirement of teacher certification for teaching in accredited private schools[5], thereby creating an unreasonable restriction upon the staffing and availability of talents in private schools. The statutes also limit reimbursement to courses required or available in public schools.[6] This places a further burden upon teachers' and parents' rights to choose a non-public school education by shrinking and in some cases even eliminating legitimate

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[3] PA. STAT. ANN. tit. 24, §§ 5601-09 (1968); R. I. GEN. LAWS §§ 16-51-2 — 51-9 (1969).

[4] If non-public schools can be given general aid without secularizing restrictions, as amici suggest at Note 9, *infra*, R.I. GEN. LAWS, § 16-51-3, and PA. STAT. ANN. tit. 24, § 5604 are unnecessarily restrictive of the materials aided schools can use. Moreover, there exist more secular teaching materials than those used by the state.

[5] PA. STAT. ANN. tit. 24, § 5604 and R. I. GEN. LAWS, § 15-51-3. These sections prevent excellent teachers and para-professionals often used by community schools from receiving aid even though these states apparently have no educational objections to such personnel.

[6] PA. STAT. ANN. tit. 24, § 5603(3) and R. I. GEN. LAWS, § 4-51-2(2). These sections place unconstitutional restrictions on experimental approaches to education and unorthodox curricula such as those of amici. In light of realistic alternatives which do not require such limitations these sections also unjustifiably restrict the rights of those who wish to pursue state approved educational goals, such as reading, in religious formats.

alternatives from which parents may choose. These restrictions may have been adopted to avoid Establishment Clause problems. But the Establishment Clause, which aims to preserve individual religious freedom, does not justify conditioning aid in a way which violates other freedoms guaranteed by the First Amendment and as part of the "fundamental liberty" of all citizens.

Justice Douglas speaking for the Court in *Griswold* v. *Connecticut*, 381 U.S. 479, 483, held that "the First Amendment has a penumbra where privacy is protected from governmental intrusion." In affirming the principles of *Meyer* v. *Nebraska*, 262 U.S. 390, and *Pierce* v. *Society of Sisters*, 268 U.S. 510, the Court mentioned several "peripheral rights" which are also protected by the First Amendment, including "the right to educate a child in a school of the parents' choice, . . . the right to study any particular subject or any foreign language, . . . and freedom of inquiry, freedom of thought and freedom to teach." 381 U.S. at 482. The *Pierce* decision held that the "fundamental theory of liberty upon which all governments in this Union repose" includes the right of parents to direct the education of their children. 268 U.S. at 535. As the Court held in *Pierce*, there is no "general power of the State to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535. The right of the state to make reasonable regulations establishing educational minima is not denied, but there is a point at which a pattern of regulations may become so pervasive that its effect is to create substantial uniformity of schools and abridge the right of choice articulated in *Pierce*. *See also Farrington* v. *Tokushige*, 273 U.S. 284. The Rhode Island and Pennsylvania purchase of secular services statutes before the Court impose, in the name of securing secular education, a pattern of regulation demanding unjustifiable conformity to the education provided in public schools.

The Rhode Island statute at issue states that its purpose is "to provide a quality education for all Rhode Island youth, those in public and private schools alike." R.I. GEN. LAWS §16-51-1. Its aim is to support education in all schools. It entitles all private school teachers to aid if they meet the statute's criteria. These criteria apply to the granting of a statutorily created benefit, which may no more be conditioned upon unconstitutional standards than unemployment benefits, *Sherbert* v. *Verner*, 374 U.S. 398; public employment, *Shelton* v. *Tucker*, 364 U.S. 479; or tax exemptions, *Speiser* v. *Randall*, 357 U.S. 513.

In the words of the Court in *Frost Trucking* v. *Railroad Commission*, 271 U.S. 583 at 594:

> If the state may compel the surrender of one Constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution may thus be manipulated out of existence.

The criteria which govern the granting of aid must pass not only the tests relevant to the Establishment Clause of the First Amendment, but also must respect other First Amendment and "fundamental liberty" considerations. Aid criteria which satisfy the Establishment Clause but substantially restrict the right of parents to choose a school different from the public school guaranteed by *Pierce* would still be unconstitutional.

The infringement of First Amendment rights of choice, to teach and learn is especially suspect when the statutory scheme is viewed in the light of the less restrictive alternatives open to the state. The fact that the separation of secular and religious education is a justifiable state purpose, does not end the inquiry, for

> . . . this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.
>
> *Shelton* v. *Tucker*, 364 U.S. 479, 488.[7]

Though amici bear no burden to spell out alternatives in detail, we do note that several have been suggested: education vouchers which would allocate funds to private schools through individual rather than state choice of recipient schools as the G.I. Bill does[8], or aid programs in which the state ensures that its minimum secular standards are met in aided schools by administering standardized tests properly adjusted for pupil characteristics. The standard Metropolitan Reading Readiness Test might be used, for example, to see whether reading was being taught at least as well as in the public school enrolling children with similar characteristics. Either of these alternatives might provide a satisfactory way of meeting Estabishment Clause standards without regulating the content and style of private schools to the point of invading privacy or limiting the expression of personal beliefs and the rights to study, teach, and choose forms of schooling other than those provided by the state.

These unconstitutional criteria on which aid is conditioned by these statutes constitute more than a mere technical violation. They will have serious practical ramifications. Independent community and free schools, such as those of the amici federations, are in as bad if not worse

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[7] *Cf.* Dean Milk Co. v. Madison, 340 U.S. 349.

[8] 77 Stat. 1177 (1958). For a more detailed description of a regulated voucher plan see Note 9, *infra*.

financial condition than Catholic schools. The effect of giving aid under these circumstances will be to force experimental, racially mixed, and publicly accredited schools to forfeit their educational principles or close, for they will in the future have to compete with state aided nonpublic as well as public schools. Imposing these restrictive standards on independent community schools as a condition of aid is rather like throwing a lifeline to a drowning man on the condition that having been saved he will become your slave. Moreover, they infringe the rights of parents to find personally suitable education for their children in violation of *Pierce.*

Amici do not oppose the granting of any aid to nonpublic schools, including religious related schools. Quite the contrary, both the survival of our educational principles and educational pluralism in general may depend upon such aid. But it is for just this reason that the form of nonpublic school aid is constitutionally and educationally critical. The form of aid adopted in Rhode Island and Pennsylvania, which protects one set of constitutional rights and liberties only at the expense of other equally important constitutional rights and liberties, should be found unconstitutional.

The restrictions in the contested statutes also limit unconstitutionally the *secular substance* of teaching even in *secular schools.*

Meyer v. *Nebraska, supra,* held unconstitutional a statute which prohibited the teaching of any language other than the English language in any school in Nebraska. In so doing the Court held that such interference with the "right to teach", and the opportunities of children to acquire knowledge was "a legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." 262 U.S. at 400. Thus any regulation of independent schools must bear a reason-

able relation to a justifiable state purpose. *See also Farrington* v. *Tokushige,* 273 U.S. 284.

The laws in question attempt to draw a line between the secular and the religious by requiring that courses and materials subsidized be those used in public schools. This limited view of what is secular effectively eliminates from aid other courses which are equally secular but ideologically or pedagogically different. This restriction on beliefs, values and educational techniques when applied to secular non-public schools is an over-broad classification which cannot be justified in the name of separation of church and state. Many of amici schools operate upon value systems which are not harmful to society (and cannot, therefore, be restricted under the doctrine established by *Meyer* and *Farrington*) but which are markedly different from those of the public schools. The Court cannot justifiably ignore as inconsequential strongly held convictions and beliefs merely because they do not take the form of articulated religious doctrine. *Cf. Welsh* v. *United States,* 90 S. Ct. 1792. The fact that no course in black history and culture is offered in public schools does not form a justification for prohibiting aid to such courses in secular private schools. A law whose goal is to restrict aid to courses only on the basis of secular content cannot deny aid to a course because the secular views discussed are not those of the state. The restrictions on these statutes, therefore, are arbitrary and unrelated to any justifiable governmental purpose.

It may be argued that any non-pubic school aid restrictions must necessarily apply to secular schools as well as religious schools if the laws are to avoid discriminating against religious schools, in violation of the Free Exercise Clause. This argument may be correct. But rights cannot be taken from secular schools in order to preserve rights of religious schools any more than religious schools could

be discriminated against in order to preserve the First Amendment rights of secular institutions. If the contested states' plans result in infringements upon the First Amendment rights of *secular* non-public schools, the states must find an alternative means of providing aid to *all* non-public schools.

Amici believe that there are plans such as the "regulated education voucher" plan [9] which are capable of providing substantial aid to non-public schools [10] which preserve the fundamental liberties of those attending both secular and religious non-public schools. Under such a plan, parents of school age children would receive vouchers for tuition which could be used in any non-public (and perhaps public) school approved by the state under its normal compulsory attendance laws. The state should provide parents with sufficient information to make intelligent choices. But as with the G.I. Bill, no complex of secularizing restrictions would be needed. We urge the Court to hold the Rhode Island and Pennsylvania plans unconstitutional, but to leave constitutional room for other forms of aid meeting the standards of *Pierce, Meyer,* and *Farrington.*

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[9] *See Education Vouchers: A Report on Financing Elementary Education by Payments to Parents*, prepared for the United States Office of Economic Opportunity by the Center for the Study of Public Policy, Cambridge, Mass. (December 1970), for a more detailed analysis of different forms of voucher plans. Regulations for insuring equal education opportunity in such plans were formulated. In particular, the proposed regulated voucher plan set forth in the report provides for stringent standards to prevent racial discrimination in aided schools. Compare the segregationist voucher plans struck down in past court decisions: *e.g.*, Brown v. South Carolina State Board of Education, 296 F. Supp. 199 (D.S. Car. 1968), *aff'd per curiam*, 393 U.S. 222; Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. (E.D.La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).

[10] For a discussion of why such a plan would not violate the Establishment Clause, see section IV, *infra*; Appendix A of the Education Voucher Report, note 9, *supra.*

II. The Rhode Island and Pennsylvania Statutes Fail To Provide Aid in the Neutral Manner Required by the First and Fourteenth Amendments Because Different Amounts Are Provided for a Student Depending on Which School He Attends.

The statutes at issue fail to meet the policy of religious neutrality required by the First Amendment because the amount of state aid available to a student depends on the school in which he enrolls. If a student attends one non-public school the state will pay more money for his education than if he attends another. The state thereby creates an economic premium on what should be unfettered choices of individuals. This disparity in funding occurs because contracts between the state and the non-pubic school or teacher provide aid regardless of the number of students enrolled in the school or course. There are no per capita provisions. As a result some schools in Pennsylvania received less than $25 per student while others received over $250.[11] The effect of these disparities in aid is that the state encourages families to send their children to the schools of the sect or sects which receive the most aid per child.

One of the fundamental requirements of the establishment and free exercise clauses of the First Amendment is that a state must "be neutral in its relations with groups of religious believers and non-believers." *Everson* v. *Board of Educ.*, 330 U.S. 1, 18. Neutrality requires that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and non-religion, and that it work deterrence of no religious belief." *Allen,* 382 U.S. at 249 (Harlan, J., concurring). This "is to insure that no religion be sponsored or favored,

[11] Pennsylvania Office of Aid to Nonpublic Schools, An Analysis of Significant Data (1969).

none commanded, and none inhibited." *Walz* v. *Tax Commission*, 90 S. Ct. at 1411.

Significantly, all of the non-public school aid programs previously upheld by the Supreme Court have provided aid in a neutral fashion. In *Cochran* v. *Louisiana*, 281 U.S. 370, textbooks were allocated to students free of cost regardless of the school they chose to attend. In *Everson* and *Allen* bus transportation and textbooks were provided in similar fashion.

In all three instances, therefore, the aid did not distort the choices that non-public schools families would have made if there were no state aid; if anything, the aid enhanced their choices. These statutes, by contrast, provide aid in a way which may seriously distort the choices families make in selecting which non-public school their children will attend.

Families cannot normally enroll their children in the Baptist school for mathematics and the Methodist school for latin. Families, in short, must select an entire school, not specific courses or teachers. The total aid per child therefore, is the relevant figure to review. Per child aid best measures the impact the state aid will have on the choice of school made by families.

Neutrality may not require that all government aid which reaches religious institutions must be provided in an absolutely neutral fashion. If the total aid is only a small portion of the school's budget, for example, biased funding may not significantly affect the choices individual families make in selecting schools. But if the state is in the position of offering ten times as much aid per child in one school as in another, the difference is clearly enough to seriously distort private choice. As with one man, one vote, there is no precise mathematical limitation on the amount of permissible variation in the aid provided per child to different schools which may readily be found in the First Amend-

ment. Thus, "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of [the religious] provisions." *Walz* v. *Tax Commission,* 90 S. Ct. at 1411. But extreme variations in aid should at a minimum not be permitted unless the state can demonstrate there was no way to provide aid which would involve fewer infringements of basic religious rights.[12] *Braunfield* v. *Brown,* 366 U.S. 599: "But if the state regulates conduct by enacting a general law with its power, the purpose and effect of which is to advance that state's secular goals, the statute is valid despite the indirect burden on religious observance *unless the state may accomplish its purpose by means which do not impose such a burden.*" (emphasis supplied). *See also Shelton* v. *Tucker,* 364 U.S. 479, 488; *Speiser* v. *Randall,* 357 U.S. 513.

Because of the way aid is provided by these statutes, some families are forced to choose between exposing their children to religious teachings not of their own choosing and receiving much less state aid for their children. Whether the extreme differences in aid are passed on to families in the form of tuition reductions, or improvements in the quality of education provided, governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed for worship. *Sherbert* v. *Verner,* 374 U.S. 398. The plaintiff in *Sherbert* was deprived of her unemployment benefits because she refused to work on Saturday contrary to her religious convictions. The Supreme Court held that this denial of state funds was unconstitutional, because the state was providing different economic consequences depending on the religious affiliation of the recipient. This

[12] Neutrality does not require that all children receive the same aid, merely that differences must be justified by the state. Disadvantaged children may, for example, require compensatory funding.

is the same inequity present in these statutes, for there is an economic consequence to the family which depends upon the religious (or non-religious) affiliation of the non-public school selected. Such favoritism violates the essence of neutrality, and should not be permitted.[13]

III. The Rhode Island and Pennsylvania Purchase of Secular Education Services Statutes Violate the Equal Protection Clause of the Fourteenth Amendment Because the States Failed to Ensure That Students' Opportunity to Enroll in Aided Schools is Not Conditioned on Race or Color; Plaintiffs in *Lemon* Have Standing to Raise the Issue.

The education provided by a state "must be made available to all on equal terms." *Brown* v. *Board of Education*, 347 U.S. 483, 493. Until recently, most states chose to provide a free public education almost exclusively through a system of public schools.[14] Now many are recognizing that an adequate education may also be provided, at least in part, through reliance on private schools.[15] The Pennsyl-

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[13] The regulated voucher plan set forth in note 9, *supra*, would preserve neutrality for a student would be given the same voucher regardless of the denomination (or nondenomination) of the school he chose to attend. For a more complete dicussion of preserving neutrality in school aid programs see Areen, *Public Aid to Nonpublic Schools: A Breach in the Sacred Wall?* 22 Case W. Res. L. Rev. No. 2 (1971).

[14] *E.g.*, the Rhode Island Constitution provides: "The diffusion of knowledge, as well as of virtue, among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools, and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education." R. I. Const. art. XII, § 1.

[15] Significantly, the Pennsylvania Constitution formerly provided: "The General Assembly shall provide for the maintenance and support of a thorough and efficient *system of public schools*, wherein all the children of the Commonwealth above the age of six years may be

vania legislature thus declared in its non-public school aid statute that:

> the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives achieved through non-public education. PA. STAT. ANN. tit. 24, § 5602(3) (1968).

But the obligation to make publicly funded education available to all on equal terms continues even though states are now choosing to rely on the private sector to provide some of the education services.[16]

Available statistics demonstrate that at present most private schools are more racially exclusive than the communities they serve.[17] Thus the United States Commission on Civil Rights concluded that "private and parochial school enrollment, which is overwhelmingly white, also is

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educated." PENN. CONST. art. X, § 1 (1966). It now provides: "The General Assembly shall provide for the maintenance and support of a thorough and efficient *system of public education* to serve the needs of the Commonwealth." PENN. CONST. art. III, § 14 (1967) (emphasis supplied). The change from "public schools" to "public education" supports the move to reliance on private schools, but affirms that it is "public" education which must be supplied, that is, education available to the public, not just to citizens of only one race.

[16] "[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted '*ingeniously or ingenuously*'." Cooper v. Aaron, 358 U.S. 1, 17 (emphasis supplied). This principle applies to any program which entrusts the public function of education in part to private schools. *Cf.* Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967), *aff'd*, 392 F.2d 120 (3rd Cir. 1968), *cert. denied*, 391 U.S. 921.

[17] In 1960, of the more than four million pupils enrolled in non-public elementary schools in the United States, only 140,529 were nonwhite. U.S. BUREAU OF THE CENSUS, 1960 CENSUS OF POPULATION, PC (2)-5A, Table A-1 at 129 (1964).

a significant factor in the increasing separation of white and Negro school children." [18] The Commission also found that nearly forty per cent of the white elementary school students in fifteen large metropolitan areas attended non-public schools in 1960; almost all of the schools were white.[19]

These statistics place a heavy burden on any state which relies on private schools for supplying publicly funded education to ensure that all students have an equal chance to attend any state supported school regardless of race or color.[20] In Pennsylvania, the preponderance of schools eligible for aid under the contested statutes were racially segregated in both composition of pupils and of teachers and administrators, such segregation arising "either by religious requirement, design, tradition, policy, quota, cost or residential pattern." [21] Yet Pennsylvania provides meagre and unreliable protections against such discrimination. There is no provision regarding discrimination in the statute at all. Article VII of Pennsylvania Governor's Code of Fair Practices which prohibits discrimination in state contracts on account of race, color, religious creed, ancestry, age, national origin or sex may apply in part, although an opinion of the Attorney General casts doubt on even this measure.[22] The Rhode Island statute merely requires compliance with Title VI of the 1964 Civil Rights Act.[23]

The difficulty of satisfying this burden when a state

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[18] UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 31 (1967).

[19] *Id.* at 39. *See also* Johnson v. Sanders, 39 U.S.L.W. 2225 (D.Conn. Oct. 14, 1970).

[20] *Cf.* Turner v. Fouche, 38 U.S.L.W. 4090 (1970); United States v. Board of Educ. of City of Bessemer, 396 F. 2d 4446 (5th Cir. 1968), *cert. denied*, 393 U.S. 1060; United States v. School Dist. 151 of Cook County, Ill., 301 F. Supp. 201, 228 (N.D.Ill. 1969), *aff'd* ___ F. 2d ___ (7th Cir. 1970).

[21] Plaintiffs' Complaint in Lemon v. Kurtzman.

[22] Appellants Brief in Lemon v. Kurtzman, p. 53.

[23] R. I. GEN. LAWS § 16-51-5.

launches upon a program of providing education through private schools, with their present pattern of racial isolation, is exemplified by *Griffin* v. *State Board of Education*, 296 F. Supp. 1178 (E.D.Va. 1969). The court held, in striking down a state tuition voucher program despite claims by the state that it would be possible to bar aid to racially discriminatory schools:

> An absolute and unequivocal prohibition [of this type of non-public school aid program] is the logical effectuation of the [Supreme Court's ruling in *Poindexter* v. *Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968). The fact that] the process is too complex to be practicable . . . defeats the assertion for the vaidity of the statute, that grants can in individual instances be employed without fostering segregation. This supposition accepted, still the canvassing and policing of the tuition law to confine its enjoyment to such instances would be a Herculean task. It could hardly give full assurance against the abuse of the law. A law may, of course, survive despite its unacceptable consequences, if the valid portions may be independently enforced. Here, as we see, there can be no such separation and the entire law must go. 296 F. Supp. at 1181-82.

At a minimum, this decision confirms that there is a heavy burden placed on any state undertaking such a program to ensure that students of all races have an equal opportunity to attend the subsidized schools regardless of race or color.

This obligation cannot be fulfilled simply by a statement of compliance with Title VI or a state non-discrimination directive, as in the Rhode Island and Pennsylvania stat-

utes, in view of the statistics demonstrating the "white" character of non-public schools. Nor can the state place its burden of policing discrimination on private individuals. The history of the difficulty of prohibiting discrimination in public schools and the knowledge of the results of unregulated individual choice indicate how difficult enforcement is even when the relatively accessible standard of residence is used to allocate students to publicly funded schools. Private schools, by contrast, select students on a one by one basis, a process which more easily conceals racial discrimination. The Constitution's prohibition against discrimination in publicly funded education is so fundamental that the states' failure to provide adequate enforcement mechanisms in these laws is not acceptable, particularly in light of the fact that adequate enforcement mechanisms are available. *See Green* v. *County School Board*, 391 U.S. 431; *Cf. Shelton* v. *Tucker*, 364 U.S. 479, 488.

At a minimum, adequate enforcement would include the authority to investigate complaints of deliberate segregation, to initiate investigations in the absence of such complaints, to collect application and enrollment data, to make findings of fact, conduct hearings, make judgments and cut off aid to schools found to be racially discriminatory.

Alternatively, a state might develop a realistic standard, focussed upon performance or effects, which would more efficiently measure compliance. An aided private school might be required, for example, to admit the same proportion of minority students as apply to the school.[24] In view of the availability of efficient and effective protections against racial discrmination in aided schools, these statutes clearly violate the Equal Protection Clause.

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[24] See The *Education Voucher Report*, *supra*, n.9 for a discussion of other possible mechanisms for preventing racial discrimination in aided nonpublic schools including random admissions, quotas and financial incentives for inclusion of minority students. *See also Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065, (1968).

If these statutes are upheld despite their failure adequately to prevent racial discrimination, the result may well be to increase racial isolation in schools and racial tension in the country. To uphold these laws, which would aggravate the nation's most ominous problem, would be contrary to the interests of amici, those attending public schools, the nation and the Constitution.

Plaintiffs in *Lemon* were denied standing even to raise equal protection claims on the grounds that their children had not been refused admission to aided non-public schools. But the violation complained of is the failure of the states adequately to insure equal access to schools aided under these statutes. The absence of these safeguards provides the nexus between individual Black plaintiffs and the denial of equal protection. Standing should be granted, and the issue heard. *See Flast* v. *Cohen*, 392 U.S. 83. *Cf. Coffey* v. *State Education Finance Commission*, 296 F. Supp. 1389 (S. D. Miss.)

Access to public schools has traditionally not been conditioned on the ability to pay. With the enactment of these statutes, states are for the first time supplying resources designated for public education through private schools. The limited amount of aid provided means that only those wealthy enough to afford whatever tuition is charged by the aided schools can benefit from the program. Because of the high correlation between race and low income,[25] the effect of this approach is to further restrict the opportunity to attend aided private schools on the basis of race or color. Though the criterion is money, the effect is to increase racial isolation. This is an additional reason why these statutes violate the Equal Protection Clause.[26]

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[25] U.S. Dept. of Commerce, Bureau of Census, *Current Population Reports, Consumer Income*, Series P-60 #75, P. 23, # 7 (Dec. 14, 1970).

[26] Conditioning access to publicly supported education on family income may itself violate the Equal Protection Clause. See J. COONS,

IV. The Rhode Island and Pennsylvania Statutes Violate the Establishment Clause of the First Amendment Because Distinctions Between Primarily Secular and Primarily Religious Instruction in Religious Schools Cannot Reliably Be Made; Moreover, in the Attempt to Provide a Dependable Method for Making Such Distinctions These Laws Create an Impermissible Degree and Kind of Entaglement Between Government and Religion in Violation of *Walz* v. *Tax Commission.*

a. *Failure to distinguish religious and secular teaching.*

Purchase of secular education services laws such as those of Rhode Island and Pennsylvania attempt to extend the language of *Board of Education* v. *Allen*, 392 U.S. 236, beyond textbooks to programs involving general aid. The ability of these stautes to meet the *Allen* test of a "secular purpose and primary effect that neither advances nor inhibits religion" depends, therefore, on the practical success of their provisions which attempt to liimt the aid provided to strictly secular activities. But because of the nature of the process regulated the safeguards adopted are unreliable.

The Rhode Island law requires as a condition for the payment of salary supplements that the teacher receiving aid "only teach those subjects required to be taught in public schools or which are provided in public schools throughout the state, or any other subjects that are taught in public school." R. I. Gen. Laws § 16-51-3. This distinguishing of secular and religious education is fundamentally different

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W. Clune, & S. Sugarman, Private Wealth and Public Education (1970); Michaelman, *On protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

from that of *Allen*. In these laws assurance of secularity depends not upon examination of a textbook which can be checked once and for all times, but upon policing the ongoing teaching process, R. I. GEN. LAWS § 16-51-3, a process which may vary from day to day. Courses with titles similar to those taught in public schools are regarded as "secular" even though they are taught in a building and a learning atmosphere permeated by religious expectations, overtones, values, and intents. In the area of teaching and course design, distinctions between the religious and the secular cannot be uniform, are not enforceable, and often are so fleeting as to create an unacceptable risk that religion will be aided.

The Pennsylvania law attempts to separate secular from religious activities by funding only four types of courses; those in mathematics, physical sciences, modern foreign languages, and physical education. PA. STAT. ANN. tit. 24 § 5604. But a survey of course titles and descriptions hardly constitutes a dependable judgment that religion is not also being taught. The line between physical sciences and biological sciences, for example, is rapidly dissolving, especially with regard to the chemical origin of life, hardly a subject devoid of theological content. If such distinctions are not tenable within the disciplines themselves, they certainly cannot be a reliable means of separating the secular from the religious in education.[27]

The problem is compounded by the fact that not only is it difficult to classify subject matter as secular or religious, but that in a religious school the method of teaching, the points of reference used, and the answers given to student questions may all be permeated by religious values and philosophy. These laws advance the bold assertion that all these parts will constitute a secular whole. Short of peer-

[27] *See also* Everson v. Board of Education, 330 U.S. 1, 46 (Rutledge, J. Dissenting)

ing into a teacher's brain or monitoring daily lessons, how can any dependable separation of secular and religious activities be made within religious schools? There are indications that it may not even be possible to judge effectively whether textbooks are secular or religious. *See Note, Sectarian Books, the Supreme Court and the Establishment Clause,* 79 YALE L.J. 111 (1969). To attempt to push such distinctions to judgments about something as organic and flexible as course content and teaching is an exercise in futility.

According to Catholic educators, Catholic educational philosophy aims at integrating a student's knowledge to give him the philosophy of life consonant with the beliefs and practices of the Catholic Church. *DiCenso* J.A. p. 212, 215, 236. This philosophy indicates an intention to integrate rather than to separate religious and secular education in Catholic non-public schools. Testimony in *DiCenso* further demonstrates that the physical character and design of the parochial schools reflects and helps to create this permeating religious atmosphere. *DiCenso* J.A. 232, 233. It is questionable whether any education can be neutral in the sense of being free of the influence of moral values or behavioral norms based upon such values. It would be strange indeed if the "secular" courses taught in a religious school organized around carefully articulated theological principles were exceptions. Certainly many parents chose to pay tuition at religious schools not merely to receive 2½ hours a week of religious instruction, but to receive a complete education which conforms to their religious values.

The difficulty [28] and consequent unreliability of making judgments about secularity where teaching rather than texts are concerned is accentuated when religious rather

[28] The line between beliefs or teachings which are "religious" and those which are philosophical or sociological is not at all clear. *Cf.* Welsh v. United States, 90 S. Ct. 1792.

than public schools are at issue. Public school officials do have to make such judgments in insuring that religion is not advanced by the public schools. *See, Abington* v. *Schempp, supra.* But in public schools, policy is controlled by a secular authority and those in attendance who represent all religious and non-religious beliefs are there to bring violations to public attention. The burden, therefore, is properly upon individual plaintiffs to demonstrate that some facet of a public school program is religious. In religious schools, on the other hand, the burden properly shifts to those who would allege that courses are secular.[29] Both the shared religious values of the policy makers and the absence of those who would protest the presence of religious teachings in "secular" courses differentiate these schools from public schools. In these cases, therefore, the burden is on the state to assure that the courses it aids are secular, since that is the basis on which these statutes are alleged to conform to the Establishment Clause. They have failed to meet this burden.

Amici do *not* contend, however, that all programs of comprehensive aid to non-public schools necessarily violate the Establishment Clause. On the contrary, Amici believe that aid which is allocated on the basis of private rather than state choice is constitutional as long as no more aid is provided than the value of the education supplied in return.[30]

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[29] The holding in *Allen*, 392 U.S. at 248, does not contradict this contention. There the Court found that "only secular books may receive approval." 392 at 245. In view of this proven "secularity," the meagre record in the case failed to show that the (secular) textbooks would be used for religious teaching. In these cases, however, it is the secularity of the teaching which is at issue. A state's responsibility for proving "secularity" in religious schools cannot be avoided by assertion where all the factors of atmosphere, philosophy of education, governance and student composition point in the opposite direction.

[30] Parent choice would not, however, justify racially discriminatory schools for the purposes and reach of the Equal Protection clause are

One example of such a plan is a regulated education voucher plan to which Amici have referred already. Under such a plan it would not be necessary to separate religious and secular activities.

The ability to trace an indirect chain from tax revenues to religious schools satisfying state education requirement does not make a law providing comprehensive aid to non-public schools unconstitutional, provided that the weight of separation of church and state falls on intervening parent choice rather than on the unreliable separation of secular and religious teaching attempted in statutes like those of Rhode Island and Pennsylvania. Amici believe, therefore, that the unconstitutionality of these statutes does not foreclose the possibility of providing significant aid to non-public schools.

b. *Failure to meet the Walz entanglement standard.*

In their unsuccessful attempt to separate secular and religious teaching so that state funds do not in fact aid religion, the Pennsylvania and Rhode Island statutes have set up a complex of regulations and surveillance which so entangle the state with religion that the laws violate *Walz* v. *Tax Commission of New York*, 90 S.Ct. 1409.[31]

In *Walz* the Court introduced a new pragmatic view of neutrality which rests on the Court's view that any program which "realistically 'establishes' religion" can be dealt with "while this Court sits." 90 S. Ct. at 1416. The opinion introduced an additional hurdle for aid programs

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greater than those of the Establishment clause and are not balanced by countervailing considerations like the Free Exercise clause.

[31] The only two federal district courts which have reviewed purchase of secular services statutes since *Walz* support this conclusion. DiCenso v. Robinson, 316 F. Supp. 112; Johnson v. Sanders, 39 U.S.L.W. 2225 (D. Conn. Oct. 14, 1970). Lemon v. Kurtzman, by contrast, was decided before *Walz*.

—there must be no excessive entanglement of the state in church affairs. The test is "one of degree." 90 S. Ct. at 1414.

As the Court noted in *Walz* the insulation and separation which the entanglement test aims to preserve does not forbid all contact. It prohibits only the degree and kind of involvement which would have a chilling effect upon religious activity, constitute an interference with religion, promote the conditions of political fragmentation along sectarian lines, or tend to politicize religion. These are the dangers which the First Amendment has always sought to prevent. The entanglement referred to in *Walz* is involvement with *religious* activity. It is crucial at this point to recognize that merely stating that the services which receive state aid are "secular" does not mean that whatever entanglement exists involves only secular activity. The excessive entanglement of these laws is a direct product of trying to separate the religious from the secular. Every regulation and decision which involves separating the secular from the religious necessarily touches upon the religious and is entangled with it. In the words of the *DiCenso* court, "we reject. . .intervenors' view that the only relevant evidence concerned the activity subsidized, i.e. secular teaching in parochial schools. Such a narrow view of relevance in effect prejudges the central legal issues of the case." *DiCenso* J.A. at 30.

Ordinary state regulations of private schools designed to insure that they meet minimal educational standards and compulsory attendance requirements do not raise the same problems of entanglement.[32] These regulations are totally secular in purpose and effect since they do not have as any part of their aim the separation of religious from secular teaching.

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[32] Restrictions on racial discrimination, which are secular in nature, would also not be barred by the entanglement test.

The majority and concurring opinions in *Walz* single out four basic attributes of impermissible entanglement of the state with religious institutions: statutory or administrative standards of a detailed nature, 90 S. Ct. at 1414; continuing relationship calling for official surveillance, id; "active rather than passive state involvement with religion," 90 S.Ct. at 1423; and governmental efforts to discern "what is or is not religious" or to examine the worth of particular programs conducted by religious institutions. 90 S. Ct. at 1414. For each of these kinds and degrees of involvement with religion, entanglement replaces separation and threatens to interfere with religion or to result in advancing religion.

The Rhode Island and Pennsylvania laws create each kind of entanglement which the Court in *Walz* suggested would be offensive. Both statutes contain extensive statutory and administrative regulations whose purpose it is to insure the secularity of aided instruction. The Rhode Island statute requires that teachers receiving the 15% salary supplement teach only courses offered or required in public schools, that the textbooks used be only those approved for public school use and that the teacher hold a state certificate and sign an oath promising not to teach a course in religion. R. I. GEN. LAWS § 16-51-2-3. Supplements are paid semi-annually by the state Commissioner. The role of the teacher is restricted by administrative regulations, setting up a tension between the ordinary direction of teaching and the requirements imposed on teachers who receive salary supplements. Amici believe that these intrusions upon the freedom of teachers create a chilling effect on the entire teaching process and distort the learning atmosphere. It will not do to argue that the restrictions are minimal because the state must only find the title of the subsidized course in a public school syllabus. Such a perfunctory examination of secularity is hardly the

mark of a state which intends seriously to regulate the separation of religious and secular teaching.

The school itself is also subject to close scrutiny by the state. The financial records of the private school are made subject to audits by the state department of education "to determine whether per pupil expenditure for secular education equals or exceeds" that in the public school R. I. Gen. Laws § 16-51-5. Subsidies are renewable annually, making the frequency and importance of this scrutiny something which is likely to be constantly in the minds of those who teach and those who administer private schools, and threatening constantly to errupt into divisive controversy between the state and the religious institutions whose life will be tied to the state subsidy. *See DiCenso* J.A. at 42. Amici believe that the state of mind engendered by such detailed standards of teaching and content cannot but impinge upon the freedom and creativity of the teacher. In the words of Justice Frankfurter, "[U]nwarranted inhibition upon free spirit of teachers affects not only those who are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice." *Wieman* v. *Updegraff,* 344 U.S. 183 at 195.

The relationship fashioned by the Pennsylvania law is similar to Rhode Island's. The standards are somewhat different, but equally detailed. They call for extensive surveillance by the state of private school activities, personnel, accounting, and performance. As with the Rhode Island law, the Pennsylvania plan determines eligibility for active transfer of subsidies on the basis of investigation about the content of a sizable segment of private school time.

Finally, it is the avowed purpose of these regulations, standards and surveillance to determine what is religious and what is not, and to assess the worth, in light of the

statutes' secular purpose, of non-public school courses, materials, and teachers.

From the perspective of the *Walz* decision and the policies of neutrality and voluntarism which underly the religion clauses, purchase of secular services plans contains a constitutionally fatal and inherent inconsistency. To guard against sponsoring or supporting essentially religious activity these laws have created a scheme whereby the state must become so entangled with the institutional and individual aspects of religious schools that the result is interference with the religious activities of these schools of an impermissible degree and quality. To avoid this interference with religious schools would be to eliminate the only protection against establishment which the laws provide and confess their inadequacy to meet constitutional requirements of separation of church and state. *See Johnson* v. *Sanders,* 39 U.S. L.W. 2225 (D. Conn. Oct. 14, 1970).

A reading of the *Walz* case which finds impermissible entanglement in the purchase of secular services plans of Rhode Island and Pennsylvania is consistent with the results reached in *Everson* and *Allen.* In *Everson,* reimbursement to parents for transportation expenses was based upon the same passive and broad classification of beneficiaries as are property tax exemptions for non-profit groups. All parents whose children use public busses to get to and from schools, whether public or private, were eligible; and no determination of secularity was required. No detailed standards or surveillance entered into the arrangement. Eligibility was not subject to constant reevaluation.

In *Allen,* though the validity of the provision of textbooks depended upon findings that they were secular, the degree and kind of entanglement involved would not have

violated the *Walz* test. The decision about the secularity of a text, once having been made, is good for the life of the book. No continuing surveillance and re-evaluation like that involved in monitoring secular instruction is required. A textbook is difficult to analyze for secularity, but it is not nearly as complex and changing as a teacher, nor as variable as course content. Moreover no examination of the internal workings and policies of religious institutions results from textbook evaluation. Perhaps most significantly, under *Allen* a religious school is not prohibited from using a religious text in the same course with the approved secular text. The state is, in a sense, merely saying that the state is funding only the *inclusion* of a secular perspective in the private school program. The purchase of secular services plans, on the other hand, actively *exclude* certain perspectives from a course as a condition of aid, making the effect of entanglement more burdensome to the teacher and a greater interference with the goals of religious schools and their sponsoring churches.

Operational separation of religious from secular teaching by regulation and enforcement is the requirement for a purchase of services plan to satisfy the Establishment Clause; yet that process inevitably entails the practical entanglement which *Walz* prohibits.

Conclusion

For all the reasons stated above Amici ask that the judgment of the District Court in *Robinson* v. *DiCenso* be affirmed, and that the judgment of the District Court in *Lemon* v. *Kurtzman* be reversed or remanded for a full hearing on the Fourteenth Amendment issues. Amici would, however, favor comprehensive state aid to non-public schools as long as the form of that aid respects the First

and Fourteenth Amendment rights of all citizens as presented above. We urge the Court not to foreclose the possibility of such aid.

Respectfully submitted,

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